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No. 85-1513

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EDWIN W. EDWARDS, in his official capacity as Governor of Louisiana, *et al.*,

Appellants,

v.

DON AGUILLARD, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AMICUS CURIAE, IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS CURIAE

The Catholic League for Religious and Civil Rights (hereinafter League) is a national civil rights organization dedicated to the right to religious freedom and the right to life of all, born or pre-born.[1] The League has had a long-standing interest in preventing the Establishment Clause from being utilized in such an overly expansive fashion that religious institutions, individuals and ideas are not allowed to thrive. The League is especially concerned that courts avoid inter-

[1] Consent for the League to file this brief has been provided by all parties and is recorded in blanket consent approval letters filed by the parties with the Clerk of this Court.

preting the Establishment Clause in the manner reflected by the court of appeals. This type of interpretation appears to prohibit public schools from including ideas in a curriculum merely because these ideas harmonize with tenets of particular religions or because the impetus for teaching such ideas comes from religiously motivated individuals. In expressing this interest the League takes no position on the question whether any scientific theory suitably explains the question of origins. The League also takes no position on whether Louisiana's Balanced Treatment Act is good public policy.

SUMMARY OF ARGUMENT

Louisiana's Balanced Treatment Act does not violate the Establishment Clause. An examination of the Act's language clearly reveals that the Act has a secular purpose of promoting academic freedom through increasing public school students' exposure to varied theories of origins. The Act requires discussion of only scientific evidence and is not a veiled attempt to introduce religious matters into a classroom. Although the secular purpose of promoting academic freedom by increasing student exposure to varied theories of origins is apparent from the face of the Act, the court of appeals failed to find this purpose. The court of appeals' impermissible failure to find this purpose stems from the fact that the court of appeals focused upon showing that the Act failed to conform to the court of appeals' conception of what academic freedom should be. Because the court of appeals never considered the validity of the Balanced Treatment Act's true secular purpose of promoting academic freedom through increasing student exposure to various theories of origins, its conclusion that the Act's language revealed an absence of secular purpose was erroneous.

The Balanced Treatment Act's secular purpose of enhancing academic freedom by providing students access to varied theories of origins is not undermined by the fact that the theories of creation science and evolution which the Act requires to be taught in public schools may harmonize with certain

religious beliefs. This Court's holdings in *McGowan v. Maryland*, 366 U.S. 420 (1961), and *Harris v. McRae*, 448 U.S. 297 (1980), clearly demonstrate that a statute's secular purpose is not undermined by the fact that it also coincides with religious tenets. This analysis has also been appropriately applied by lower federal courts in school curriculum cases, like this one, in which the courts have held that the religious or irreligious nature of particular matters included in a public school curriculum did not violate the Establishment Clause as long as a legitimate, secular curricular purpose justified their inclusion. The secular purpose of increasing students' exposure to varied theories of origins fills that role in this case.

Likewise, religiously oriented individuals' support for the Balanced Treatment Act does not demonstrate an absence of secular purpose. The clear presence of a secular purpose for this law means that this is not a case like *Wallace v. Jaffree*, 105 S. Ct. 2479 (1985), in which religiously oriented legislative statements were utilized as a basis for invalidating a statute which the Court concluded clearly lacked a secular purpose.

Finally, the Balanced Treatment Act is not an attempt to suppress the teaching of evolution of the type held invalid by this Court in *Epperson v. Arkansas*, 393 U.S. 97 (1968). The Act actually implements *Epperson* and the First Amendment values contained therein by increasing, rather than decreasing, student exposure to various theories of origins.

ARGUMENT

LOUISIANA BALANCED TREATMENT ACT DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

In addressing the constitutionality of Louisiana's Balanced Treatment Act[2] it is important that this Court consider only the requirements explicitly set out in the Act and the question of whether these requirements violate the Establishment

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[2] La. Rev. Stat. §§ *17: 286.1 et seq.* (1981) [hereinafter Act].

Clause. Whether creation-science, evolution or any other theory fully explain human or world origins is without relevance. Further, whether Louisiana's attempt to require balanced discussion of theories of creation science and evolution in a public school classroom is good public policy is of little moment. The only issue for this court is whether this exercise of Louisiana's responsibility to establish public school curricula violates the Establishment Clause by failing to display a secular purpose. A full consideration of the Balanced Treatment Act demonstrates that it has a secular purpose of increasing students' exposure to varied theories of human and world origins and, thus, does not violate the Establishment Clause.

A. Consideration of the Language of the Louisiana Balanced Treatment Act Reveals a Secular Purpose of Promoting Academic Freedom by Increasing Student Exposure to Varied Theories of Origins.

The court of appeals' panel opinion purported to rest its holding primarily upon the basis that the language of the Balanced Treatment Act reflected an absence of secular purpose. *See Aguillard v. Edwards,* 765 F.2d 1251, 1257 (5th Cir. 1985). However, an extensive consideration of the Act's language reveals that the necessary secular purpose exists. This purpose is the promotion of academic freedom through increasing students' exposure to varied scientific theories relating to the origins of man, the world and the universe.

On its face the Act requires only that "creation science," defined as "the scientific evidences for creation and inferences from these scientific evidences,"[3] and "evolution science," defined as "the scientific evidences for evolution and inferences from these scientific evidences,"[4] both be

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[3] *Id.* § 286.3(2).

[4] *Id.* § 286.3(3).

taught if a public school has educational programs "that deal in any way with the subject of the origin of man, life, the earth or the universe."[5] The Act implements its basic purposes by explicitly requiring only that *scientific* not religious evidence be presented for each theory.[6] The Act does not require Biblical or other religious explanation of the presuppositions of or inferences from creation science or evolution science.[7] In fact, the Act expressly states that books purchased to implement its purposes be non-religious.[8] From this brief consideration of the Act's language it is clear that the seven dissenting judges below accurately characterized the Act when they noted that the Act has no direct religious reference whatever and merely requires that the whole scientific truth be taught on the subject [of origins] if any is." *Aguillard v. Edwards*, 778 F.2d 225, 227 (5th Cir. 1985) (denying rehearing *en banc)* (Gee, J., dissenting). On its face, then, the Balanced Treatment Act does not appear to reflect anything other than its stated purpose of promoting academic freedom by allowing students access to diverse scientific theories of origins. This purpose clearly satisfies the constitutional requirement that there be some secular purpose for

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[5] *Id.* § 286.4A.

[6] *Id.* §§ 286.3(2), 286.4C. Presumably, if no legitimate scientific evidence existed for either theory the Act would require only that statements be made to this effect.

[7] *Id.*, and *see* Brief of Defendant State of Louisiana In Opposition to ACLU Motion for Summary Judgment and In Support of State Motion for Partial Summary Judgment, filed in *Aguillard v. Treen*, No. 81-4787 (E.D. La. 10 January 1986) [hereinafter State Brief] at 17-22.

[8] Act, *supra* note 1 at § 286.6.

the Act.[9]

However, in finding that the Balanced Treatment Act had no secular purpose the court of appeals' panel opinion held that the Act did not implement its stated secular purpose of promoting academic freedom. *See* 765 F.2d at 1257. The Court based its conclusion upon the fact that the Act did not provide individual instructors with complete autonomy to teach any theory the instructor saw fit. *See id.* In the panel's opinion such autonomy was necessary to the furtherance of "academic freedom." *See id.*[10]

The difficulty with the court of appeals' position, however, is that the failure of the Balanced Treatment Act to implement the panel's personal understandings of what academic freedom really is does *not* demonstrate the absence of a

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[9] *See Wallace v. Jaffree,* 105 S. Ct. 2479, 2490, 2491, 2492 (1985); *Lynch v. Donnelly,* 465 U.S. 668, 680 (1984); *Mueller v. Allen,* 463 U.S. 388, 394-395 (1983). These precedents, which hold that the Establishment Clause is violated only if a law "is entirely motivated by a purpose to advance religion," *Jaffree,* 105 S. Ct. at 2490, mean that the court of appeals' panel opinion was erroneous to the extent it purported to require a "pre-eminent" secular purpose for the involved legislation. *See Aguillard v. Edwards,* 765 F.2d at 1256-1257. As this Court noted in *Lynch v. Donnelly,* 465 U.S. at 681 n.6 (certain citation material omitted): "We hold only that Pawtucket has a secular purpose for its display, which is all that *Lemon v. Kurtzman* . . . requires. Were the test that the government must have exclusively secular objectives, much of the conduct and legislation this Court has approved in the past would have been invalidated."

[10] The panel also appeared to believe that a teacher exercising academic freedom could teach creation science but that the State could not constitutionally mandate balanced treatment for creation science. *See* 765 F.2d at 1257. It is difficult to believe that the Constitution freely permits state agents (teachers) to teach subject matter which the State cannot constitutionally require to be taught. Indeed, the court of appeals view appears inconsistent with the notion that curriculum is properly the responsibility of state authorities rather than individual teachers, *see, Cary v. Board of Education,* 598 F.2d 535, 542-544 (10th Cir. 1979), *accord Epperson v. Arkansas,* 393 U.S. 97, 115-116 (1968) (Stewart, J., concurring). Along these

secular purpose. If the panel had carefully analyzed the language of the statute, it would have found a realistic attempt to increase the amount of information received by students. Although the use of the term "academic freedom" to describe the Act's purpose may have been a bit confusing, the fact is that students' exposure to differing views are increased as a result of the Act. As the dissenting opinion correctly noted, the statute requires simply that "the whole scientific truth be taught on the subject [of origins] if any is." 778 F.2d at 227 (Gee, J., dissenting). As the dissenting opinion again correctly noted, this purpose, clearly apparent from the statute's wording, is secular. *See, id.* at __. The explanation for the panel's failure to find this purpose is simple. By focusing upon its own conception of "academic freedom" rather than upon the Act's true secular purpose of increasing students' academic freedom by exposure to diverse scientific theories of origin, the panel failed to see the secular purpose actually forwarded by the legislature. Accordingly, the language of the Act reflects the necessary secular purpose to sustain the Act against Establishment Clause challenge.

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lines the United States Court of Appeals for the 7th Circuit held in *Palmer v. Board of Education*, 603 F.2d 1271, 1274 (7th Cir. 1979) that there is a compelling state interest in adherence to a suitable curriculum for the benefit of both young citizens and society and that this interest precludes individual teachers from teaching merely what they please. *Palmer, id.* at 1274. The *Palmer* court further held that a teacher has no constitutionally superior autonomy to forego some portion of the curriculum, especially in order to substitute for it her own religious views, *id.* It would seem that the necessary state action for an Establishment Clause violation is present whether the actions involved are those of individual teachers or of local or state curriculum-setting bodies. In this case, however, the secular interest in providing the entire truth on the subject of origins, would permit either governmental bodies exercising curriculum supervision or individual teachers properly exercising academic freedom to teach all theories of origins including creation science and evolution science.

B. Harmony Between Religious Viewpoints and Portions of State Mandated Curricula does not Invalidate the Act's Secular Purpose.

Although the language of the Balanced Treatment Act standing alone reflects a clear secular purpose, the court of appeals also appeared to rest its conclusion of the absence of a secular purpose on its perception of the historic context surrounding the Act. *See,* 765 F.2d at 1256. Specifically, the court of appeals appeared to find the harmony of creation science with Christian fundamentalism particularly important, especially when this fact was combined with Christian fundamentalism's historic rejection of evolutionary theories.

The court of appeals' reliance on harmony between religious viewpoints and creation science as a basis for its finding of an absence of secular purpose for the Act was inappropriate. It is settled law under the Establishment Clause that the mere convergence between governmental action and a religious tenet fails to create an Establisment Clause violation.[11] Such a principle is based upon the notion, stated by this Court as recently as last year in *Wallace v. Jaffree,* 105 S. Ct. 2479 (1985), that a law lacks a secular purpose only if it "is entirely motivated by a purpose to advance religion," *id.* 105 S. Ct. at 2490. As this Court also recognized in *Jaffree,* a law may have a secular purpose even if "motivated in part by a religious purpose," *id.*

The principle that harmony between religious viewpoints and the objects of legislation does not invalidate a law under the Establishment Clause was illustrated in two principal cases. In *McGowan v. Maryland,* 366 U.S. 420 (1961), the Court upheld against Establishment Clause challenge a set of laws dictating cessation of certain types of commercial activities on Sunday, notwithstanding the fact that such laws 1) originally were in accord with particularized religious doctrines regarding the religious sanctity of Sundays, *id.* at

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[11] *See Harris v. McRae,* 448 U.S. 297, 319-20 (1980), *McGowan v. Maryland,* 366 U.S. 420, 442 (1961).

431-433 and 2) were for the purpose of furthering or protecting religious consciousness and activity, *id.* at 432. Similarly, in *Harris v. McRae,* 448 U.S. 297 (1980), this Court upheld against establishment clause challenge restrictions on the federal funding of certain elective abortions, notwithstanding the harmony between the effect of the restrictions (diminution of abortions) and the particularized belief of the Roman Catholic Church condemning abortion, *id.* at 319-20. In both of these cases the harmony between these laws and certain religious tenets was justified on the basis of legitimate secular purposes. In *McGowan* the Court relied upon the general, non-religious benefits of a legally enforced "day of rest," 366 U.S. at 444-445, while in *Harris* the Court pointed to the traditional, secular mores of the American populace regarding abortion, 448 U.S. at 319.

In light of *McGowan* and *Harris* it is clear that the Balanced Treatment Act does not fail to have a secular purpose merely because it requires public schools to teach theories of creation or evolution which are in harmony with the tenets of particular religions. The religious significance which can be inferred from either mandated theory is certainly no greater than the harmony between legislation and particular religious views sanctioned by *McGowan* and *Harris.* Very clearly, the maximization of students' academic freedom through the required presentation of more than one theory of origins in this case supplies the same type of secular purpose which permitted the legislation found in *McGowan* and *Harris* to withstand Establishment Clause scrutiny.

Indeed, other lower courts have used this type of analysis to permit public school curricula to withstand Establishment Clause attack. For example, in *Grove v. Mead School District,* 753 F.2d 1528 (9th Cir. 1985) the court upheld against free exercise and establishment clause challenge the inclusion in a high school required reading list of a novel which offended a student's religious beliefs. Although noting that secular humanism may be a religion, *id.* at 1534, the court justified the book's inclusion, notwithstanding its perceived religious overtones, on the ground that it had the effect of

providing comment on American subculture, *id.* Similarly, in *Williams v. State Board of Education*, 388 F. Supp. 93 (W.D. Va. 1975), *aff'd. mem.* 530 F.2d 972 (4th Cir. 1975), the court ruled against an establishment clause challenge to the use of textbooks which allegedly promoted disbelief in a Supreme Being and disrespect for the Bible as a religious text. Both these cases stand for the proposition that the perceived religious or irreligious effect of aspects of a school's curriculum, will not override a showing of some permissible secular purpose. While these cases arose in the context of Establishment Clause challenges based upon a curriculum's establishment of a secularistic position, rather than the establishment of a theistic position, the Establishment Clause analysis is identical in either case. *See, e.g., Lynch v. Donnelly,* 465 U.S. 668, 673 (1984), (Establishment Clause equally prohibits advancement of or hostility toward religion). So long as there is a legitimate secular curricular purpose, such as increasing the range of available knowledge, harmony with religious or anti-religious beliefs is inconsequential. Accordingly, this Court must uphold Louisiana's Balanced Treatment Act against Establishment Clause challenge because it implements the secular purpose of increasing student's academic freedom by promoting exposure to differing theories of origin, despite the fact that it may call for teaching of theories in harmony with tenets of particular religions.

C. Certain Religiously Motivated Individuals' Support of the Balanced Treatment Act does not Demonstrate an Absence of Secular Purpose.

Another point utilized, particularly by Appellees,[12] to demonstrate an absence of secular purpose is the support religiously motivated individuals provided the Balanced Treatment Act. Although such an argument appears to be

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[12] *See* Appellees Motion to Affirm 10-19, *Edwards v. Aguillard*, No. 85-1513 (October Term 1985, U.S. Supreme Court).

fundamentally anti-democratic, as it would effectively call into question any legislation supported by individuals whose political outlook is consistent with their religious outlook, it also fails to demonstrate the absence of secular purpose. As long as there is a secular purpose for legislation, such as "requiring the truth to be taught," 778 F.2d at 228 (denying rehearing *en banc)* (Gee, J., dissenting), it is irrelevant whether certain legislators may have supported the legislation on religious grounds.[13] Indeed, *McGowan* and *Harris,* discussed in Section B *supra,* appear to stand precisely for this point. Accordingly, this is not a case like *Wallace v. Jaffree,* 105 S. Ct. 2479 (1985), in which religiously oriented legislative statements were utilized as a basis for invalidating a statute with no purpose other than the invalid religious purpose of requiring prayer in schools.[14] Here the involved statute clearly has a secular purpose of promoting academic freedom by increasing student exposure to various theories of origins or as the dissenters below noted, requiring that "the truth be taught." 778 F.2d at 228. This secular purpose requires the Balanced Treatment Act to be upheld despite its support by religiously motivated individuals.

D. The Balanced Treatment Act is not an Impermissible Attempt to Suppress the Teaching of Evolution.

The court of appeals concluded its opinion by noting that the Balanced Treatment Act's absence of secular purpose was further reflected in the fact that it attempts to utilize crea-

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[13] *See Wallace v. Jaffree,* 105 S. Ct. 2479, 2490 (1985) (to fail to have a secular purpose a law must be entirely motivated by a purpose to advance religion. A secular purpose still exists if a law is motivated in part by a religious purpose.

[14] *Wallace v. Jaffree,* 105 S. Ct. 2479, 2485 n. 30, 2490-91, 2490 nn. 43, 44, 2492.

tion science to discredit the theory of evolution, 765 F.2d at 1257.[15]

While a state may not constitutionally suppress the teaching of evolution on a religious basis, *Epperson v. Arkansas*, 393 U.S. 97 (1968), it does not follow that the Establishment Clause is violated by requiring balanced treatment of the scientific evidences for both evolution and creation-science. All this accomplishes is an increase in the knowledge to which students are exposed, or achievement of the purpose "that the whole truth be taught." 778 F.2d at 228 (denying rehearing *en banc)* (Gee, J., dissenting). Such a purpose is at the very heart of the function of the classroom which is "peculiarly the marketplace of ideas." *Keyishian v. Board of Regents of New York*, 385 U.S. 589, 603 (1967). Although *Epperson* forbids a state orthodoxy precluding on religious grounds the teaching of evolution, 393 U.S. at 106, 109, it would seem just as clear that the Balanced Treatment Act implements *Epperson* and the "fundamental" First Amendment "values of freedom of . . . inquiry," protected therein, *id.* at 104, by increasing, rather than decreasing, student exposure to scientific exploration of varied theories of origins. The competition of ideas with varying incidental religious significance[16] in the "marketplace of ideas" is the exact im-

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[15] This point appears to contradict the court's discussion in the previous paragraph that the Act fails to advance creation science since it fails to require its teaching if evolution science is not also taught. *See* 765 F.2d at 1257. The obvious reason why the statute does not perfectly advance creation science is the same reason why it is not hostile to evolution. All the Act is designed to do is stimulate the dissemination of scientific ideas supporting each theory. This the Establishment Clause does not forbid, *see Calvary Bible Presbyterian Church v. Board of Regents*, 72 Wash. 2d 912, 919, 436 P.2d 189, 193 (1967), *cert. den.*, 393 U.S. 960 (1968) (the religion clauses "Do not proscribe open, free, critical and scholarly examination of the literature, experiences and knowledge of mankind").

[16] This is, of course, not to be construed as an admission that creation-science is, after all, a religious concept. The point, rather, is that while

plementation of the First Amendment policy not to "tolerate laws which cast a pall of orthodoxy over the classroom," *Keyishian, id.* at 603. Accordingly, the policies of *Epperson* and other cases which prevented the suppression of evolution are implemented, rather than impeded by the healthy competition of ideas stimulated by the Balanced Treatment Act. Thus, the Balanced Treatment Act does not violate the Establishment Clause by opposing evolution.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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many controversial concepts now allowed access to public school fora have varying degrees of inferential significance, supportive or destructive, for traditional religion, this implicit "religiousness" has, clearly, not been enough to require their exclusion from consideration in public schools. The rationale for allowing these ideas access to public schools is precisely the one condemning the exclusion from the public schools of creation science, viz., the benefit to "our young citizens and society," *Palmer v. Board of Education*, 603 F.2d 1271, 1274 (7th Cir. 1979) of stimulating classroom debate about "the best that is known and thought in the world," *Mailloux v. Kelly*, 323 F. Supp. 1387, 1392 (D. Mass.), *aff'd per curiam* 448 F.2d 1242 (1st Cir. 1971).